FILE COPY

FILED
NOV 25 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, As Chief of the Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLEE

U. S. WEBB,
Attorney General of the State of California,
WILLIAM F. CLEARY,
Deputy Attorney General of the State of California,
ALBERTA BELFORD,
Attorneys for Appellee.

CALIFORNIA STATE PRINTING OFFICE

72536

SUBJECT INDEX

	Page
PRELIMINARY STATEMENT	1
I. The Registration Fees Provided for by Subdivisions (*b*) and (*c*) of Section 77 of the California Vehicle Act Are Not Tolls	2
II. Subdivisions (*b*) and (*c*) of Section 77 of the California Vehicle Act Do Not Offend the Due Process Clause, the Equal Protection Clause, or Any Other Clause of the Fourteenth Amendment to the Constitution of the United States	19
III. The Fees Here In Question Do Not Offend the Constitution of the State of California	36
CONCLUSION	38
APPENDIX	39

TABLE OF CASES

	Page
Anthony et al. vs. Kozer, (D. C.) 11 F. (2d) 641	14
Augusta vs. Augusta & A. Ry. Co., 130 Ga. 815; 61 S. E. 992, 993; 124 Am. St. Rep. 197	3
Bell's Gap Railroad vs. Pennsylvania, 134 U. S. 232, 237	34
Cunningham vs. Potts, 9 F. (2d) 469, 471	10
Florida Central & Etc., R.R. Co., vs. Reynolds 183 U. S. 471, 480	35
Hendrick vs. Maryland, 235 U. S. 610, 622, 35 S. Ct. 140, 59 L. Ed. 385, et seq.	13–16–19
Huse vs. Glover, 119 U. S. 543, 548, 549	18
Jennings vs. Coal Ridge Improvement Co., 147 U. S. 147	35
Kane vs. New Jersey, 242 U. S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222	13
Kane vs. New Jersey, 242 U. S. 160	16–22
Liberty Highway Co. vs. Michigan Public Utilities Commission, 294 Fed. 703, 708	11

TABLE OF CASES—Continued

	Page
Martine et al. vs. Kozer, (D. C.) 11 F. (2d) 645	13–14–15
Matter of Application of Schuler, 167 Cal. 482	33–37–38
Merchants' Bank vs. Pennsylvania, 167 U. S. 461, 463	33
Monongahela Navigation Co. vs. United States, 148 U. S. 312, 329, 330	18
Morris et al. vs. Duby et al., 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966	13
Minnesota Rate Cases, 230 U. S. 352, 405	18
Orr vs. Gilman, 183 U. S. 178, 287	36
Sanger vs. Lukens, 24 F. (2d) 226, 229	12
Smallwood vs. Jeter, 244 Pac. 149, 156	10–13
Sprout vs. South Bend, 277 U. S. 163	23–26–28–32
State ex rel. Locoste vs. Vigneaux; 130 La. 424; 58 So. 135, 137	7–12
St. Louis vs. Western Union Tel. Co., 148 U. S. 92	3
Transportation Co. vs. Parkersburg, 107 U. S. 691, 699	18
U. S. Code—Sec. 9*a* of Title 23—Federal Highway Act	3–9
38 Cyc. 359	14

TEXTS AND STATUTES CITED

	Page
California Vehicle Act—	
Sec. 21	5–28
Sec. 77, subs. (b) and (c)	1–5–16–19–20–23–26–32–36–37
Secs. 78 and 79	19
Sec. 159, sub. (2)	24
Sec. 160, sub. (a)	25
Secs. 169 and 170	31
Stats. of Cal. 1929, Chap. 95	30
Stats. of Cal. 1921, Chap. 195	30
Political Code of California, 365d	30
Constitution of California—	
Sec. 12 of Article XI	37
Sec. 36 of Article IV of the	37

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1929

No. 86

CARLEY & HAMILTON, INC., et al.,
Appellants,

vs.

FRANK G. SNOOK, As Chief of the Division of Motor Vehicles,
Appellee.

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

This is an action in equity brought by appellants to enjoin the appellee, as Chief of the Division of Motor Vehicles of the State of California, from exacting those motor vehicle registration fees specified in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act.

It is contended by appellants that such fees constitute "tolls" for the use of the highways of the state, including federal aid highways and post roads, that the exaction of tolls for the use of federal aid

highways and post roads is in derogation of the federal highway act and the post road act, and that consequently the provisions of the California Vehicle Act, requiring the exaction of such fees, are void.

It is further contended by appellants that such fees are exacted as compensation for the use of state and county highways as distinguished from city streets, that they do not operate their vehicles upon such highways, but operate them upon city streets exclusively, and that consequently the exaction of such fees as to them violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Two other contentions are made which will be noted later.

Sections 21, 36, 49, 77, 78, 79, 159, 160, 161 and 163 of the California Vehicle Act are set forth in the Appendix to this brief.

I

The Registration Fees Provided for by Subdivisions (b) and (c) of Section 77 of the California Vehicle Act Are Not Tolls.

The word *toll* when used with reference to roads, canals, bridges and the like is usually defined as "a charge exacted for the use of a common passage." There are other definitions of similar import, and each is sufficient for general purposes; but there is no definition of the word which we have found which

is explicit enough to serve as a basis for distinguishing a toll from a tax.

It is true that a toll is a charge exacted for the use of a common passage, but it is not true that all charges exacted as conditions precedent to the use of common passage are tolls.

In the first place, a toll is a charge exacted by the proprietor as compensation for the use of property: it is a demand of proprietorship, whereas a tax is a demand of sovereignty.

Augusta vs. *Augusta & A. Ry. Co.,* 130 Ga. 815; 61 S. E. 992, 993; 124 Am. St. Rep. 197.
St. Louis vs. *Western Union Tel. Co.,* 148 U. S. 92.

A toll as compensation for the use of property includes within it a reimbursement for the cost of maintaining the property for use, and also a payment, by way of rent or profit, to the proprietor for permitting his property to be used.

This incident of a toll was recognized by Congress in enacting Section 9-a of Title 23 of the U. S. Code. Such title is the Federal Highway Act as codified. Section 9, the provision relied upon by appellants, reads:

> "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds."

And section 9-a provides:

> "Notwithstanding any provision of this title,

the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any free bridge, federal aid under such title, in the construction of any toll bridge and approaches thereto, by any state or states, or political subdivision or subdivisions thereof, upon the condition that such bridge is owned and operated by such state or states, or political subdivision or subdivisions thereof, and that all tolls received from the operation thereof, less the actual cost of operation and maintenance, are applied to the repayment to the state or states, or political subdivision or subdivisions thereof, of its or their part of the cost of construction of such bridge, and upon the further condition that when the amount contributed by such state or states, or political subdivision or subdivisions thereof, in the construction of such bridge shall have been repaid from the tolls, the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a free bridge."

Under such provision it is out of the rents and profits of the tolls (*i. e.,* those portions of the tolls which are in excess of the amounts necessary to maintain and operate the bridge) that the state or political subdivision reimburses itself for its cost of constructing the bridge. Ordinarily, such rents and profits go, and continue to go, to the proprietor for his own use. In this instance they go to the proprietor until it has reinmbursed itself for its expenditure, and then all tolls cease.

The two concluding clauses of the provision are of particular significance, namely: the clauses:

> "—the collection of tolls for the use of such bridge shall thereafter cease, and the same shall be maintained and operated as a *free* bridge."

The use of the word *free* in this connection is indicative of the meaning Congress attached to the word *toll*. It was never contemplated by Congress that the state should not be privileged to raise the revenue necessary to operate and maintain the bridge. What Congress sought to prohibit was the charging of a special, or direct, fee for the use of the bridge as distinguished from a general, or indirect, levy.

As we have already shown, a toll is a demand of proprietorship, where as a tax is a demand of sovereignty. A tax is imposed not as compensation for the use of property, but for the general good.

Let us pause for a moment and apply this distinction between a toll and a tax to the facts before us. The registration fees provided for by subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are exacted as conditions precedent to the use of motor vehicles, trailers and semitrailers (falling within the classes specified in such subdivisions) upon public highways, and a public highway is defined by section 21 of the Act as:

> "Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct or trestle laid out or erected as such by the public or dedicated or abandoned to the public or intended or used by

or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term 'public highway' shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term 'public highway' shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public."

Appellants make a particular point of the fact that many of the ways covered by such definition were neither acquired nor improved at state expense, and are not maintained at state expense. Indeed, they contend that all the streets within incorporated cities fall within such category. Following such contention they say that of consequence the state has no proprietary right over such ways or streets, and is not entitled to exact compensation for their use. Assuming the matter of expense to be the determining factor of proprietorship then it follows that the registration fees provided for in such subdivisions of the California Vehicle Act do not fall within the classification of a toll in that they are not exacted as reimbursement for money expended, or as rent or profit for the use of property over which the state has the right of proprietorship. Conversely, such fees fall within the classification of impositions for the common good, for it goes without saying that the

enforcement of the regulations of a state law (*i. e.*, the California Vehicle Act) and the construction, reconstruction and maintenance of state and county highways is for the common good.

In this particular at least, the fees provided for in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are characteristic of taxes as distinguished from tolls.

Another distinction is to be made between a tax and a toll, and that is, that a toll is usually exacted at the point of use, whereas a tax is usually exacted at the seat of government. There is an early case upon this point, that of

> *State ex rel. Lacoste* vs. *Vigneaux,* 130 La. 424; 58 So. 135, 137.

It involved the imposition of license fees on buggies and other means of conveyance, the amount collected to be applied to the maintenance and repair of public roads. The court said:

> "Something has been said about a 'toll.' That has no application. That is something imposed at the locality where a passageway is used for special benefit received. The use of a public road is not considered in that light."

Of course, it does not follow that a toll could not be devised which would be exacted at the seat of government rather than at the point of use. For example, should a legislature require the payment of a special registration fee as a condition to the use of

a certain highway, such a registration fee would be *in the nature of* a toll, or of an extra or special charge, for the use of *that* highway, as distinguished from other highways. But that situation is not presented here; in this case all public highways are treated alike, and one pays no more nor no less for using one than for using all.

Another usual, if not invariable, characteristic of a toll is that the amount of the charge is in proportion to the amount of use to which property is put, whereas a usual, though not invariable, characteristic of a tax, and particularly of a license tax, is that its amount is determined by a time, rather than by a use, factor. For example: The toll for the use of a toll road, toll canal or toll bridge is usually charged each time the road, canal or bridge is used, and is graduated according to the weight, or the number of passengers, actually transported, whereas the amount of a tax is usually computed upon an annual, monthly or daily basis, although the amount or nature of use, or potential use, may be taken into consideration.

In the case before us there is no attempt to fix the charge according to the actual use which is made of the highways. The registration fees provided for are exacted on an annual basis, and within the year covered by the fees the vehicle owner is licensed to use it on the highways for as many passenger or ton-miles as he sees fit, as long as he does not exceed the lawful speed limits, or load the vehicle so as to ex-

ceed the weight per area of tire surface in contact with the road restrictions.

It is true that in addition to the time factor the nature and extent of potential use, as distinguished from actual use, is taken into consideration, and the fees apportioned accordingly. But that is true of many forms of license taxes, of which the theater license tax, graduated according to the seating capacity of the theater, and the barber shop license tax, graduated according to the number of chairs, are common examples. In those cases, as in this, it is the extent of potential use, rather than the extent of actual use, which forms the basis of graduation. Such is not a customary method of determining the amounts of toll to be charged.

There is still another characteristic of a toll, or rather of a toll road, which deserves consideration. It is that a toll road is usually but a link in a highway system, a link having both a beginning and an end, and which differs from the roads with which it connects in that a special charge is made to traverse it, whereas the roads with which it connects are traversed without payment of special fees.

In a sense this is a repetition of what we have already said, but it serves to illustrate the distinction between a free and a toll road, a distinction recognized by jurists and lay persons alike, a distinction recognized by Congress in the Federal Highway Act itself.

See U. S. C. Title 23, Section 9a, *supra*.

So far we have dealt with the general characteristics of a toll as distinguished from a tax, and have cited no authority involving the construction of the word *toll* as used in the Federal Highway Act. Let us turn to the cases dealing with such subject.

In the case of *Smallwood* vs. *Jeter,* 244 Pac. 149, 156, the Supreme Court of Idaho said:

> "The five per cent tax levied by the act is not a 'toll'. Its levy is not in violation of 'the acts of November 9, 1921 (1921 supp. fed. st. ann. 95, (U. S. Comp. Stat. Ann. Supp. 1923, secs. 7477¼–7477¼y) and of July 11, 1916 (1918 supp. fed. stat. ann. 639) (U. S. Comp. Stat. Sec. 7477a *et seq.*)), forbidding tolls on federal aid roads.' It is a license tax laid not upon the vehicle, but upon the privilege of using the highways for business purposes."

In the case of *Cunningham* vs. *Potts,* 9 F. (2d) 469, 471, the court said:

> "If a tax of two cents a gallon paid by the seller or distributor of gasoline used in vehicles operated or intended to be operated upon the public highways of the state, is in any sense a toll charged for the use of such public highways, it is not forbidden by section 9, because there are public highways of the state for the privilege of using which, by motor vehicles, the state has the undoubted right to exact such tax. If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal

aid highways, a different question would be presented."

The appeal of that case to this court was dismissed by this court. (47 S. Ct. 334.)

It should be observed that a gasoline tax is in one respect at least more in the nature of a toll than are the registration fees now under consideration, for the amount of gasoline consumed by a motor vehicle bears a direct relationship to the number of ton-miles traversed by the vehicle, and so the amount of tax collected would bear a direct relationship to the use made of the highways.

In the case of *Liberty Highway Co.* vs. *Michigan Public Utilities Commission,* 294 Fed. 703, 708, the court was considering a statute which imposed an annual license fee of one dollar for each one hundred pounds of weight of each motor vehicle used as a common carrier over the highways of the state, and provided that such license fees should be in addition to the motor vehicle tax prescribed by general law. The court said:

"Section 9 of the Federal Highway Act of November 9, 1921 * * * provides:

'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds.'

This is not in our judgment intended to refer to license fees such as are here involved (it not being even claimed that such act has reference to the analogous fees imposed under general motor vehicle license laws or to laws licensing drivers

of such vehicles). *State* vs. *Vigneaux,* 130 La. 424; 58 So. 135. The most that can be said of it in this connection is that such a provision is merely a condition attached as between the federal government and the state to the contribution of aid provided by federal legislation, and can not deprive the state of its power and duty as trustee of the public highways for the benefit of the people of the state to enact reasonable regulations in the exercise of its police power over such highways."

In the case of *Sanger* vs. *Lukens,* 24 F. (2d) 226, 229, the court was considering a statute of the state of Idaho requiring persons engaged in the automobile transportation business to do certain things, including the payment of certain fees in amounts rated according to the capacities of the vehicles used, the fees so collected to be used for the maintenance of state highways. The court said:

"It is further claimed and strenuously insisted upon by the plaintiff that the act of Congress, relating to the appropriation of funds for the construction of highways and generally known as 'government aid,' wherein it is provided that highways shall be free from 'tolls,' withholds from the state the power to prescribe regulations for their use. This question has been decided adversely to plaintiff's contention by both the Supreme Court of the state and of the United States. In referring to the state law, the Supreme Court of the state held that 'the 5 per cent tax levied by the act is not a 'toll.' Its levy

is not in violation of 'the Acts of November 9, 1921 (1921 Supp. Fed. Stats. Ann. 95 (23 USCA sec 1 *et seq.*)), and of July 11, 1916 (1918 Supp. Fed. Stats. Ann. 639 (Comp. St. secs. 7477a-7477i, 5150a)), forbidding tolls on federal aid roads.' It is a license tax, laid not upon the vehicle, but upon the privilege of using the highways for business purposes.' *Smallwood* vs. *Jeter, supra.* In the case of *Morris et al.* vs. *Duby et al.,* 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966, recently decided by the Supreme Court of the United States, it was held that a regulation relative to a license fee of motor vehicles, imposed by the state statute for the use of the highways for hire, has no relation to the tolls inhibited by the act of Congress. The court said:

'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick* vs. *Maryland,* 235 U. S. 610, 622, 35 S. Ct. 140, 59 L. Ed. 385, *et seq.*; *Kane* vs. *New Jersey,* 242 U. S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222.' *Martine et al.* vs. *Kozer,* (D.

C.) 11 F. (2d) 645; *Anthony et al.* vs. *Kozer* (D. C.) 11 F. (2d) 641.

Thus we see that the license fee or privilege tax imposed by the statute is not a 'toll' of any kind within the meaning of the act of Congress, and therefore the state legislation is not void."

Next, we would call the court's attention to the cases of *Anthony* vs. *Kozer* and *Martine* vs. *Kozer,* both in 11 F. (2d), the former at page 641, and the latter at page 645. In the former case the court had under consideration a gasoline tax of the state of Oregon. The court said:

"Further than this the tax lacks the characteristics of a toll. In its general acceptation toll is 'a settled, certain and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; a consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359.

No doubt the Congress had in mind, in adopting the clause, 'all highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage,

the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of Congress in extending aid to the states for construction and maintenance of their roads and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of Congress, and is therefore not to be condemned as such."

In the latter case, that of *Martine* vs. *Kozer, supra,* the court had before it for consideration a statute of the state of Oregon directly corresponding to the California Vehicle Act. Under section 21 of that statute license fees, graduated from three dollars to ninety-seven dollars per vehicle according to the style and weight of the car, were required to be paid by the owner, and the license fees on motor trucks, trailers and semitrailers were graduated upon a different basis, and, in some instances, were higher than on the machines classed as motor vehicles. It was contended that such license fees amounted to tolls for the use of highways including federal aid highways and post roads, and that section 25 of the statute and the license fees therein provided for were void as being in contravention of the acts of Congress. The court held that such fees were not tolls within the meaning of that word as used in the acts of Congress, and dismissed the suit. Such case is so

directly in point, and its language is so clear and persuasive, that we are setting it forth in full in the appendix of this brief.

In the case of *Kane* vs. *New Jersey,* 242 U. S. 160, 168, this court had under consideration a state law requiring the registration of motor vehicles and the payment of fees of $3, $5 or $10, depending upon the horsepower of the vehicle. It was contended that such provisions violated the commerce provisions of the federal constitution and also the fourteenth amendment to that constitution. The question as to whether such fees constituted tolls as disinguished from taxes was not involved, but this court, after stating that a state had the right to impose such fees as compensation for the use of the facilities afforded, said:

> "The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the state to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semiannually, or by a toll based on mileage or otherwise."

Thus we see that this court has recognized that fees such as are provided for in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act are not tolls.

In the earlier case of *Hendrick* vs. *Maryland,* 235 U. S. 610, 622, this court, in passing upon the registration and fee provisions of a state vehicle law, said:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. *This is but an exercise of the police power uni-*

formly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce."

(Italics ours. The portion italicized is of significance in view of the contention of appellants that the fees here involved are not exacted under the police power.)

Further on this court said:

"The prescribed regulations upon their face do not appear to be either unnecessary or unreasonable.

In view of the many decisions of this court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. *The amount of the charges and the method of collection are primarily for determination by the state itself*; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Transportation Co.* vs. *Parkersburg,* 107 U. S. 691, 699; *Huse* vs. *Glover,* 119 U. S. 543, 548, 549; *Monongahela Navigation Co.* vs. *United States,* 148 U. S. 312, 329, 330; *Minnesota Rate Cases,* 230 U. S. 352, 405; and authorities cited. The action of the state must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facili-

ties supplied by the state, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we can not say from a mere inspection of the statute that its provisions are arbitrary or unreasonable." (Italics ours.)

In this case, as in the case of *Kane* vs. *Maryland,* there is no evidence concerning the value of the facilities supplied by the state or the cost of maintaining them. In the next division of this brief we will deal with the fairness of the methods adopted for collecting the charges imposed.

Before closing our discussion of this point, we wish to call the court's attention to the fact that appellants on page 28 of their brief say:

"In the *Hendrick* case, as well as in the *Kane* case, the plaintiffs demanded protection under the commerce clause, and this court held that the commerce clause would not protect them as the exactions were 'tolls.'"

Such statement is unsupported by either case.

II

Subdivisions (b) and (c) of Section 77 of the California Vehicle Act Do Not Offend the Due Process Clause, the Equal Protection Clause, or Any Other Clause of the Fourteenth Amendment to the Constitution of the United States.

It will be observed that, with the exception of the exemptions specified in sections 78 and 79 of the Cali-

fornia Vehicle Act (see Appendix), the provisions of subdivisions (*b*) and (*c*) of section 77 thereof operate alike on all persons from one end of the state to the other. Appellants do not contend that the exemptions mentioned constitute discrimination. What they do contend is that subdivisions (*b*) and (*c*) of section 77 do not afford them the equal protection of the law, and deprive them of property without due process of law, because they are not placed in a special category, and granted special exemptions. They contend that such subdivisions of such section are unconstitutional because all persons *are* treated alike, instead of being grouped into classes, and given different treatment.

The State of California requires that, as a condition precedent to its use upon the public highways of the state, each motor vehicle, trailer and semi-trailer be registered, and that as a condition precedent to such registration certain fees, graduated according to the weight, type and use of such vehicle, be paid to the state. When such fees are paid, a license is issued which permits the vehicle to be operated *over any and every public highway in the state for the period of one year.*

The appellants own and operate a number of motor vehicles. *They* do not wish to operate them over all of the public highways within the state, but only over those public highways located within a particular area. For *that* reason they do not think that they should be required to pay the same registration

fees for the registration of their vehicles as other persons are required to pay for the registration of vehicles operated, or intended to be operated, over a greater area. Indeed, appellants contend that because the statute does not issue restricted (instead of general) licenses for their vehicles, and requires them to pay the uniform fees for the registration of their vehicles, that the statute denies them the equal protection of the law, and deprives them of property (the fees) without due process of law.

If such contention were sound then it would be incumbent upon the state to grant not one or two, but innumerable forms of license, each drafted so as to permit the vehicle for which it is issued to traverse those highways, and only those highways, *which its owner wishes it to traverse, and to fix a special fee in accordance with such wishes of the vehicle's owner.*

It goes without saying that the state is not required to pursue such a course. To pursue it would be the height of folly for even an earnest attempt to enforce the restrictions of the various licenses would require expenditures far in excess of the amount the state now receives for the issuance of general licenses, and a complete enforcement would be impossible without establishing checking stations at frequent intervals over all the highways of the state and stopping each vehicle at each station for an inspection of its license. Such a procedure would place a heavy burden upon travel and upon commerce,

and would be a reversion to the conditions which existed three or four hundred years ago.

The fact that the statute takes no account of the actual use which is made of the highways is of no moment. A somewhat similar point was raised in the case of *Kane* vs. *New Jersey, supra,* and this court disposed of it in the following language:

> "The Maryland law contained a reciprocal provision by which nonresidents whose cars are duly registered in their home state are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against nonresidents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee."

Appellants assert that the question as to whether the state has the right to exact license fees from them as a condition precedent to their use of the streets of an incorporated city is determined by whether or not the state has incurred an expense in the acquisition or maintenance of such streets.

The case of *Sprout* vs. *South Bend,* 277 U. S., 163, cited by appellants, and being the main authority relied upon by them in support of their contention that the fees involved in this case offend the Fourteenth Amendment, does not support that contention, but, properly considered, is an authority in our favor.

On page 169 of that decision this court said:

> "It is true that, in the absence of federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, nondiscriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded."

And on the following page this court said:

> "It is true, also, that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways."

Such are the two purposes for which the state exacts the fees specified in subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act. Those, with other fees and charges, are first used to defray the costs of administering the regulations contained in the California Vehicle Act, and the balance is

divided into two equal parts, one of which is expended by the state in the construction and maintenance of state highways, and the other is distributed among the several counties of the state to be used by them for the construction and maintenance of county highways subject to the following provision:

> " * * * the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities wherein the legislative bodies of which by ordinance authorize such work and construction, maintenance and repair."
>
> California Vehicle Act, Sec. 159, Sub. (*c*).

In the absence of a showing to the contrary it is not to be inferred that the counties in which appellants operate their vehicles have not exercised the authority conferred upon them by the foregoing provision, nor can it be inferred that they will not exercise that authority in the future. Indeed, one of the affidavits filed upon appellants' behalf in the court below, being the affidavit of one of appellants' attorneys, contains the following statement:

> " * * * that under the provisions of clauses of section 159 of said act such counties may and do spend considerable amounts of monies for the construction of highways within the confines of incorporated cities, the amount of which expenditures is at the present time unknown to affiant."
>
> Record, p. 9, ff. 11 and 12.

Again: Subdivision (*a*) of section 160 of the California Vehicle Act provides:

> "All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor following an arrest of such person by an officer employed by a city, shall be paid into the city treasury and deposited in a special fund to be known as the 'street improvement fund' which is hereby created and which shall be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within such city. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom."

The legislature, in enacting the California Vehicle Act, might well have provided that fines collected under subdivision (*a*) of section 160 should be deposited in the motor vehicle fund together with the other fees and charges imposed by that act. Had the legislature done so, and then provided that a portion of the motor vehicle fund should be distributed among the incorporated cities of the state, there would be no question but that the fees of which appellants complain were used in part for the construction and maintenance of city streets. Instead of so providing, the legislature turned over to the several cities—for them to employ in the construction, maintenance and improvement of their streets,

bridges and culverts within such cities—a specific source of revenue to be derived under the California Vehicle Act. As the legislature did not leave the cities free to spend the fines collected for any municipal purpose, it can not be said that the purpose, or the sole purpose, of the legislature was to compensate the cities for the expenses to which they had been put in assisting in the enforcement of the California Vehicle Act. On the contrary, it must be held that the appropriation of such fines in the way they are appropriated was but a part of a state-wide plan of construction and maintenance of the public highways of the state, including the streets within incorporated municipalities, and it must be held that, by the California Vehicle Act, the state has assumed, and is bearing, a financial burden with regard to the construction and maintenance of city streets.

To reiterate: the fees provided for by subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act, together with other fees and charges collected under such act, are expended for the following purposes and none other: (1) the enforcement of the regulations of the California Vehicle Act; and (2) the construction, repair and maintenance of state highways, county highways and city streets.

But to revert to the case of *Sprout* vs. *South Bend.* This court held that it did not appear that the fees involved in that case were imposed for either of the two purposes enumerated.

As to the first, this court said:

"But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee can not be sustained as a police measure."

And as to the second, this court said:

"But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets."

There are two thoughts contained in the last quotation which appellants may stress. The first is that the amount of use should be taken into consideration in fixing the fees, and the second is that where they are exacted for use of the streets of a certain city

they should be devoted to the construction and maintenance of such streets.

As to the amount of use: It is an undisputed fact in this case that appellants operate their vehicles exclusively within the State of California, and exclusively over the public highways of California, as the term *public highway* is defined by section 21 of the California Vehicle Act. (See Appendix.) As the licenses granted to appellants include the right to traverse all of such highways, and as those are the only highways they traverse, they can not be heard to say that they make no more than occasional use of such highways.

As to the expenditure of the fees: In the *Sprout* case the fees were exacted by the city for the use of its streets, and this court held that to justify such fees as a contribution to the cost of constructing and maintaining the highways under the city's jurisdiction it must appear that such fees were to be expended for the construction and maintenance of such highways. In this case the fees are exacted by the state, and not by the city, and to justify their imposition as a contribution to the construction and maintenance of highways it need not appear that they are to be expended upon the particular highways over which appellants operate their vehicles: it is sufficient if it appears that such fees are to be expended for the construction and maintenance of highways within the state's jurisdiction.

But even if it be assumed that the fees here in question are exacted as compensation for the use of highways which the state has constructed or maintains, as distinguished from the highways constructed and maintained by cities, and even if it be conceded that to justify the imposition of such fees as to appellants it must be made to appear that they make use of highways constructed or maintained by the state, still appellants' suit and plea is without merit.

Appellants, in their pleadings and in their brief, have assumed, and would like to have this court assume, that all streets within incorporated municipalities are constructed and maintained by those municipalities, and that neither the state nor the counties construct or maintain any highways within such corporate limits.

This assumption is unwarranted, as the following provisions of the laws of California manifest.

One statute provides:

> "The several counties, municipalities and road divisions of this state, within the limits of which may exist a state highway or highways under the jurisdiction and control of the state engineering department, are hereby empowered to do or order to be done on such highways any paving, curbing, street work or sewer work authorized by law; *provided, however,* that permission to do any such work shall first be obtained from the state department of engineering and all grades, elevations or curb lines sought to be established

or pavement proposed to be constructed by any county, municipality or road division shall first be approved by said engineering department of the state; *and provided, further,* that in case any existing pavement should be injured as a result of such work, such pavement shall be restored to the satisfaction of said engineering department."

Statutes of California 1919, chapter 95.

The other statute provides:

"Whenever county bonds shall be voted or a special tax levied for paving a county highway system, and the natural course of such highway system runs into or through any municipality, it shall be the duty of the county board of supervisors to include in, and pave such portion of, said system located within such municipality as may be designated by the mayor or other chief executive thereof and the county supervisor in whose district such portion of the highway is located, and said portion shall be constructed of the same width and materials (or equal thereto) as the highway approaching such municipality; *provided,* that in case such chief executive and such supervisor shall not agree as to what highway or highways shall be designated, then the chairman of the state highway commission shall designate the same and his judgment shall be final and conclusive."

Statutes of California 1921, chapter 195.

In addition to such statutes we would call the court's attention to section 365*d* of the Political Code of California, which provides in part:

"The California Highway Commission shall take and have full possession and control of all roads and highways which have been declared and adopted state roads and state highways, and all state roads and state highways which may hereafter be acquired or constructed * * *. Said commission is further empowered to relinquish to any county, city, or city and county, any portion of any state road or highway within said county, city, or city and county, with the consent of the board of supervisors of such county or city and county or governing body of such city and thereupon the title to said portion of said road or highway so relinquished shall revert to said county, city or city and county, as a county road or city street as the case may be * * *."

The provisions of the laws of California which we have quoted, including sections 169 and 170 of the California Vehicle Act, show that the state and the counties of the state do construct and maintain highways within the corporate limits of the cities of the state, and that the state and the counties do appropriate money to the cities to be used by them in the construction and maintenance of their streets. In the absence of a showing to the contrary, it is not to be assumed that the state or its several counties have made exceptions in these particulars as to the cities in which appellants operate their vehicles.

Appellants may argue that the use they make of state and county highways within the corporate limits of their respective cities is an incidental use and

differing in great degree from the use made of state and county highways by persons using those highways for the intersectional transportation of persons for hire and property. They may contend, also, that such sums as the state and counties appropriate to the cities for use by them in constructing and maintaining city streets is trivial in comparison to the sums expended by the cities for such purposes. Appellants may stress certain language which we have quoted from the case of *Sprout* vs. *South Bend, supra,* and argue that this difference in degree of use and this difference in degree of expense should have been taken into consideration in fixing the fees here involved.

While there may be some difference in degree of use, and some difference in degree of expense, those differences need not be taken into consideration, for to do so the state would have to undertake to license vehicles upon the basis of actual use made of the highways and in proportion to the actual expense of the state in constructing and maintaining those highways. As we have heretofore indicated, such an undertaking would entail a prohibitive amount of inspection and regulation, much to the public detriment.

Appellants also contend that the Legislature of 1927, in repealing the clause "for each such vehicle weighing, when unladen, less than 3000 pounds: $10," which theretofore had been contained in subdivision (*c*) of section 77 of the California Vehicle

Act, made the whole subdivision unconstitutional as offending the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

This contention is that as vehicles weighing less than 3000 pounds, when unladen, are now permitted to operate on the highways in the transportation of persons for hire or property, without the payment of any special fee, whereas vehicles used for the same purpose, but weighing in excess of 3000 pounds, when unladen, are required to pay a special fee, there is an unjust discrimination between persons similarly situated, and who are in direct competition with each other.

The answer to that contention is that the fees imposed are graduated according to the destructive propensities of vehicles, and that the Legislature, in exempting vehicles weighing less than 3000 pounds, when unladen, from the payment of special fees, has found that the destructive propensities of such vehicles are so slight as to justify such vehicles being placed in a special and exempted category. (See *Matter of Application of Schuler,* 167 Cal. 482.)

The soundness of that classification and exemption is evident, for such vehicles do not require the heavy type of pavement for their use that is required by vehicles of greater weight, and the damage they do to pavements is less than that done by heavier vehicles.

In the case of *Merchants' Bank* vs. *Pennsylvania,* 167, U. S. 461, 463, this court said:

"But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution."

And again:

"It was well said by Mr. Justice Williams, speaking for the Supreme Court of Pennsylvania, in the opinion in the present case: 'The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand.' Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap Railroad* vs. *Pennsylvania*, 134 U. S. 232, 237, in which case Mr. Justice Bradley, speaking for the court, said:

'The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable

ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them * * *. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt.' See also *Jennings* vs. *Coal Ridge Improvement Co.*, 147 U. S. 147."

See also *Florida Central & Etc. R. R. Co.* vs. *Reynolds*, 183 U. S. 471, 480.

The graduated income and inheritance tax statutes granting complete exemptions as to sums below a stated amount are directly comparable with the stat-

ute here in question. It has been held repeatedly that those statutes operate alike upon all persons similarly situated. See *Orr* vs. *Gilman*, 183 U. S. 178, 287. So, also, the present statute operates alike upon all persons similarly situated.

III

The Fees Here in Question Do Not Offend the Constitution of the State of California.

(A) Appellants contend that sublivisions (*b*) and (*c*) of section 77 of the California Vehicle Act offend section 21 of Article I of the Constitution of California, such provision being:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, *nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.*" (Italics ours.)

If we understand appellants' contention, it is that the exempting of vehicles weighing less than 3000 pounds, when unladen, from the payment of special fees violates such provision of the Constitution of the State of California. In answer to such contention it is sufficient to point out that the classification is of vehicles and not of persons, and that the exemption is offered to all persons upon the same terms. Furthermore, the classification and exemption of light weight vehicles is reasonable. See

In the Matter of the Application of Schuler, 167 Cal 282.

(B) It is also contended by appellants that subdivisions (*b*) and (*c*) of section 77 of the California Vehicle Act violate section 12 of Article XI of the Constitution of California, which constitutional provision reads as follows:

> "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

But the fees provided for by such subdivisions of such section of such act are not taxes imposed upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, but are taxes imposed for the privilege of using certain types of vehicles upon the public highways in the transportation of persons for hire or property. (*Matter of the Application of Schuler, supra.*) Furthermore, such fees, in so far as they are collected for county and city purposes, are authorized by section 36 of Article IV of the Constitution of California (see appendix, page 47) and even if they were not so authorized the result would be that section 159 of the California Vehicle Act would be

unconstitutional, leaving section 77 in full force and effect. (*Matter of the Application of Schuler, supra.*)

CONCLUSION

We respectfully submit that the decision of the court below should be affirmed.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California,
WILLIAM F. CLEARY,
Deputy Attorney General of the State of California,
ALBERTA BELFORD,
Attorneys for Appellee.

APPENDIX

I

Sections 21, 36, 49, 77, subdivisions (*a*), (*b*) and (*c*); 78, 79, 159, 160, 161 and 163 of the California Vehicle Act.

"Public Highway."

SEC. 21. Every highway, road, street, alley, lane, court, place, trail, drive, bridge, viaduct, or trestle laid out or erected as such by the public or dedicated or abandoned to the public, or intended or used by or for the general public, except such portions thereof as are used or prepared for use by pedestrians as sidewalks. The term "public highway" shall apply to and include driveways upon the grounds of universities, colleges, schools and institutions. The term "public highway" shall not be deemed to include private driveways, roads or places used by the owner, his guests and those having business with the owner and not intended to be otherwise used, or otherwise used by the general public.

Application for Registration.

SEC. 36. (*a*) Every owner of a motor vehicle, trailer or semitrailer which shall be operated upon the public highways of this state shall for each such vehicle owned, except as herein otherwise provided, apply to the division for the registration thereof.

(*b*) Application for the registration of a vehicle herein required to be registered shall be made upon the appropriate form furnished by the division and shall contain the name and address of the owner and legal owner, also a description of the vehicle, including the name of the maker, the motor number, the date first sold by the manufacturer or dealer to the consumer and such further description of the vehicle as shall be called for in the form, and such other information as may be required by the division.

(*c*) In the event that the vehicle to be registered should be a specially constructed, reconstructed or an imported vehicle, such fact shall be stated in the application, and upon the registration

of every imported motor vehicle which has been registered theretofore in any other state or country, the owner shall surrender to the division all number plates, seals, certificates of registration or other evidences of such former registration as may be in the applicant's possession or control.

Exceptions.

(*d*) The provisions of this act requiring the registration of certain vehicles shall not apply to special mobile equipment nor to implements of husbandry temporarily drawn, moved or otherwise propelled upon the public highways.

Registration Fee Must Be Prepaid.

SEC. 49. The division must not grant any application for registration, renewal of registration or transfer of registration of a vehicle nor issue any registration certificate or number plates provided for in this act to any person unless the correct fee therefor specified in this act shall have been paid.

Registration Fees.

SEC. 77. (*a*) A registration fee of three dollars shall be paid to the division for the registration of every motor vehicle, trailer or semitrailer, except for those which are exempted in this act, and such fee shall be paid at the time application is made for registration.

Fees for Electric Vehicles.

(*b*) In addition to the registration fee specified in subdivision (*a*) of this section, there shall be paid for the registration of every electric passenger motor vehicle a registration fee of ten dollars, and for the registration of every electric motor vehicle designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, there shall be paid fees according to the following schedule:

For each such vehicle weighing, when unladen, less than six thousand pounds	$50.00
For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds	70.00

For each such vehicle weighing, when unladen, ten thousand pounds or more ---------- 90.00

(c) The following registration fees in addition to the registration fee specified in subdivision (a) of this section shall be paid for the registration of vehicles, including trailers and semi-trailers, designed, used or maintained primarily for the transportation of passengers for hire, or for the transportation of property, according to the following table, except that the fees specified in this subsection need not be paid for electric vehicles. When such vehicles are equipped wholly with pneumatic tires:

For each such vehicle weighing, when unladen, three thousand pounds or more but less than six thousand pounds ---------- ~~$8.00~~ $15.00

For each such vehicle weighing, when unladen, six thousand pounds or more, but less than ten thousand pounds and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds -- 40.00

For each such vehicle weighing, when unladen, ten thousand pounds or more and limited under the provisions of this act to a total weight, including vehicle and load, not exceeding twenty-two thousand pounds ---------- 50.00

For each such vehicle weighing, when unladen, six thousand pounds or more and entitled under the provisions of this act to a total weight, including vehicle and load, in excess of twenty-two thousand pounds ---------- 70.00

Vehicles Not Equipped With Pneumatic Tires.

When such vehicles are not equipped wholly with pneumatic tires there shall be paid in addition to the fees specified in subdivision (a) of this section fees according to the weight thereof unladen amounting to twice the fees set forth in the foregoing table.

Fees for Less Than Year.

Upon registration issued after the beginning of the registration

year, the fees required under subdivisions (*b*) and (*c*) of this section shall be reduced by one-twelfth for each month which shall have elapsed since the beginning of the registration year.

Exemptions From Registration Fees.

SEC. 78. The registration fees specified in this act, except fees for duplicate number plates or certificates, need not be paid for any motor vehicle, trailer or semitrailer owned by any foreign government or by a consul, or other official representative thereof, or by the United States, or by any state or political subdivision thereof, or owned by a voluntary fire department organized under the laws of this state when such vehicles are used exclusively for fire-fighting purposes, nor for any like vehicle owned by or used exclusively in the operative work of such corporations as are taxed solely for state purposes under the constitution of this state, nor for any like vehicle used exclusively by a company in the operative work of its business of transportation of persons or property as a common carrier for compensation over any public highway of this state between fixed termini, or over a regular route, and subject to taxation under the provisions of section 15 of article XIII of the constitution of the State of California. All such vehicles shall be registered as herein required by the person having custody thereof and such custodian shall display official registration plates bearing distinguishing marks thereon which shall be furnished by the division free of charge.

Fees To Be Paid by Manufacturers and Dealers.

SEC. 79. The following fees shall be paid to the division for the registration of vehicles permitted by this act to be registered and registered under a general distinguishing number assigned to a manufacturer of or dealer in motor vehicles, in lieu of any other fees specified in this act; and such fees shall be paid at the time application is made for registration and for additional plates according to the following table:

(*a*) For the registration of motor vehicles other than motorcycles—

For the first set of number plates	$5.00
For each additional set of number plates	3.00

(*b*) For the registration of motorcycles—

For the first plate	5.00
For each additional number plate	1.00

(*c*) For the registration of trailers or semitrailers—

For the first plate	5.00
For each additional number plate	1.00

Motor Vehicle Fund.

SEC. 159. (*a*) There is hereby created in the state treasury a fund which shall be known as the "motor vehicle fund." The state treasurer shall deposit all money received by him from the division or otherwise under the provisions of this act into the motor vehicle fund.

(*b*) There is hereby appropriated out of such fund all moneys received as operators' and chauffeurs' license fees and duplicate operators' and chauffeurs' license fees and in addition thereto such portion of the remainder of such motor vehicle fund not exceeding in any registration year twenty-five per cent thereof as may be necessary for the maintenance of the division of motor vehicles to be expended by the division in carrying out the provisions of this act; ~~(and the division of motor vehicles is hereby authorized out of said funds to purchase real estate and erect such buildings as it may require, subject to the approval of the department of finance.)~~ There shall be deducted from the sums which the division is allowed to expend hereunder such amount as may be allowed to said division in each calendar year under budget appropriation by the state Legislature. The division may draw, without at the time furnishing vouchers and itemized statements, sums not to exceed in the aggregate one hundred thousand dollars, said sums so drawn to be used as a revolving fund where cash advances are necessary. At the close of each fiscal year the moneys so drawn must be accounted for and substantiated by vouchers and itemized statements submitted to and audited by the board of control and by the controller. The balance of said fund, after the expenditure of so much as may be permitted by this act for the support of the division of motor vehicles, shall be known as the "net receipts" and shall be devoted to the purposes and in the manner herein specified.

(*c*) One-half of such "net receipts" is hereby appropriated and shall be paid from the motor vehicle fund to the counties of this state in proportion to the number of vehicles registered in such counties as determined by the places of residence of the owners to whom the registration certificates are issued. All amounts paid under this section to the counties shall be deposited in the road funds of the several counties receiving the same and shall be expended by such counties exclusively in the construction and maintenance of public roads, bridges and culverts in said counties respectively; *provided,* that the board of supervisors of any county may in its discretion expend any portion of such sums so received by such county in the construction, maintenance and repair of streets, bridges and culverts within those incorporated cities therein the legislative bodies of which by ordinance authorize such work of construction, maintenance and repair. The board of supervisors of any county, or city and county, may also in its discretion expend any portion of such sums so received by such county, or city and county, for payment of interest upon, or redemption of bonds, the proceeds of which have been used for the construction, maintenance and repair of streets, bridges and culverts within such county, or city and county. The board of supervisors of any county, or city and county which is empowered by law to expend money for the construction of public highway outside of its corporate limits, may expend any portion of the amounts paid to the said county, or city and county, and deposited in the special road improvement fund or other road fund thereof, as herein in this section directed, in and for the construction of public highways outside of its corporate limits; *provided, however,* that the construction thereof is authorized by ordinance of the board of supervisors of the county or city and county, in which said highway is to be constructed. Where such authorization is given by ordinance, as herein provided, the board of supervisors of the county, or city and county desiring the said construction, may, through its own boards, officers or commissions expend the amounts herein authorized to be expended, or may, by ordinance of its board of supervisors, transfer said amounts to the account of the highway commission of the State of California and may by said

ordinance specify and determine the route and type of construction of said highway, and the said amount thus transferred shall, if accepted by the said highway commission, be expended by said commission for the purpose specified and determined in said ordinance, and not otherwise.

(*d*) The board of supervisors of each county in the state shall establish a road fund in the county treasury for the receipt of such funds received, as hereinbefore provided, and shall also make an annual report to the state department of public works not later than three months after the close of the counties' fiscal year, upon forms to be provided by the state department of public works, showing the amount of moneys received from the motor vehicle fund during the preceding fiscal year and the disposition of said moneys, specifying in such detail as may be required by said department the roads, bridges and culverts constructed or maintained out of said moneys and the sums applied to the several items of such construction or maintenance.

(*e*) The state controller shall in the months of February and August of each year draw his warrants upon the motor vehicle fund in favor of the county treasurer of each county for the amount to which said county is entitled hereunder, except that the state controller shall not draw his warrant upon the motor vehicle fund in favor of the county treasurer of any county which has not established a road fund, as required hereunder, or which has failed, neglected or refused to file the report showing the amount of money heretofore received by such county from the motor vehicle fund and the disposition thereof, as hereinbefore required, until such county has established a road fund and shall make the reports herein required; *provided, however,* that in cases where the actual domicile, residence or place of abode of an owner, or part owner, of any motor vehicle, trailer or semitrailer is in a different county than the place which such owner has designated as his place of residence in his registration certificate, the county auditor of the county receiving such funds from the state as hereinabove provided may draw his warrant in favor of the county containing the actual domicile, residence, or place of abode of such owner, or part owner, in such sums as may properly be attributed to the latter county.

(*f*) All moneys remaining in the motor vehicle fund after the expenditures hereinbefore in this section authorized, together with all sums that have been heretofore or that may be hereafter appropriated by the Legislature for the same purpose, shall be paid into the state highway maintenance fund and shall be expended under the direction of the state department of public works for the maintenance, repair, widening, resurfacing and reconstruction of state roads and highways under the jurisdiction of said department and for the maintenance, repair, widening, resurfacing and reconstruction of roads and highways in state parks, subject to the approval of the official or officials charged by law with the management and control of such parks, such money to be so drawn from the motor vehicle fund for the purpose of such maintenance, repair, widening, resurfacing and reconstruction upon warrants executed by the state controller upon demands made by the state department of public works and allowed and audited by the state board of control.

Disposition by Cities of Fines and Forfeitures.

SEC. 160. (*a*) All fines or forfeitures collected upon conviction or upon the forfeiture of bail of any person charged with a violation of any of the provisions of this act constituting a misdemeanor following an arrest of such person by an officer employed by a city, shall be paid into the city treasury and deposited in a special fund to be known as the "street improvement fund" which is hereby created and which shall be used exclusively in the construction, maintenance and improvement of public streets, bridges and culverts within such city. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be ground for removal therefrom.

Disposition of Other Fines and Forfeitures.

(*b*) All fines or forfeitures collected upon conviction for violation of any of the provisions of this act following arrest by any officer employed by the state or by a county or city and county and whether collected by a justice of the peace, police court, city recorders court, city justice of the peace or otherwise shall be paid to the treasurer of the county or incorporated

city and county in which the court is held and said moneys shall belong to such counties and cities and counties respectively and shall be used by the several counties and incorporated cities and counties solely in the construction, maintenance and improvement of roads, streets, bridges and culverts within their respective limits and for no other purpose.

Constitutionality of Act.

SEC. 161. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Title.

SEC. 163. This act shall be known and cited as the "California vehicle act."

II

Section 36 of article IV of the constitution of California:

State Highway System Authorized.

SEC. 36. The Legislature shall have power to establish a system of state highways or to declare any road a state highway, and to pass all laws necessary or proper to construct and maintain the same, and to extend aid for the construction and maintenance in whole or in part of any county highway.

III

The decision of the federal court in the case of *Martine* vs. *Kozer*, 11 Fed. (2d) 645:

Wolverton, District Judge. This is a suit instituted by a large number of persons, owners of motor vehicles, in behalf of themselves and all others similarly situated, against the Secretary of

State of the state of Oregon, to enjoin him from exacting the annual registration or license fees for motor vehicles, imposed by chapter 371 of the 1921 General Laws of the State, as being in contravention of the Rural Post Roads Act of Congress of July 11, 1916 (chapter 241, 39 Stat. 355 [Comp. St. §§ 7477a-7477i]), as amended February 28, 1919 (chapter 69, 40 Stat. 1189, 1200 [Comp. St. Ann. Supp. 1919, § 7477bb et seq.]), and the Federal Highway Act of November 9, 1921 (chapter 119, 42 Stat. 212 [Comp. St. Ann. Supp. 1923, §§ 7477¼–7477¼y]), whereby it is declared that all highways constructed under the provisions thereof "shall be free from tolls of all kinds." The bill of complaint is challenged by motion to dismiss.

The state act is general in its purpose and application, designed for governing the use of roads and highways within the state by motor vehicles of all kinds, and including, among other subjects, rules of the road, equipment, brakes, etc., registration of motor vehicles, etc. Registration is required to be made annually with the secretary of state. By section 25 of the act, annual license fees, which are graduated from $3 up to $97 per vehicle, according to style and weight of the car, are required to be paid by the owner. The license fees on motor trucks, trailers, and semitrailers are graduated upon a different basis, and in some instances are higher than on machines classed as motor vehicles.

By its section 26 the act exempts such motor vehicles and trucks from the payment of all other taxes and licenses, except municipal license fees. Section 44 provides in effect that all moneys received by the secretary of state from this source shall be deposited with the state treasurer. After the payment of the expenses of administering the act, three-fourths of the fund thus accumulated must be transferred to the state highway fund for such purposes as are provided by law, and the remaining one-fourth is required to be remitted by warrant of the secretary of state to the county treasurers of the counties, to be deposited (section 45) to the credit of the "motor license fund" which is required to be created in each county. By section 46 the funds thus accumulated may be used for the payment of interest and retirement of bonds issued for the construction and improvement

of roads, or to defray the expenses of preparing the roadbed, bridges, etc., for construction of state highways, or, under certain conditions, in the discretion of the county court, in any other manner for general road purposes.

By section 8, chapter 383, General Laws of Oregon of 1921, the state highway commission is authorized to pay the principal and interest upon highway bonds, as the same shall become due, from any funds subject to its control, from whatever source the same may come, without regard to the origin of said funds. The single ground upon which plaintiffs predicate their right for relief is that the registration or license fees exacted on motor vehicles are, in legal contemplation, a toll for the right to travel upon and to use the highways of the state, constructed or reconstructed in part under and in pursuance of the acts of Congress above cited, and by the aid of appropriations from the general government, and therefore that such exactions are void and unenforceable.

We had occasion in an analogous case, Anthony et al. v. Kozer, Secretary of State (D. C.) 11 F. (2d) 641, to examine into the characteristics of a toll, as within the intendment of the acts of Congress relating to rural post roads and federal highways, and held that an excise tax exacted from dealers engaged in vending gasoline to be used for propelling motor vehicles upon the highways of the state was not a toll inimical to the denunciation of Congress. The registration or license fees here involved do not purport to be a charge for traveling upon the public highways of the state, or for the right to use such highways for traffic thereon. If such fees can be regarded as tolls, it must be because of their indirect effect as relating to travel upon and the use of such roads by the general public. That they do not affect the whole public is demonstrable by the suggestion that persons operating motor vehicles through the state are not required to pay the registration or license fees, so that as it respects nonresidents the highways are absolutely free from tolls of any kind. Such nonresidents, however, are subject to the regulatory features of the law, as it relates to traffic on the highways, the same as residents operating motor vehicles thereon.

It cannot be doubted that chapter 371 of the General Laws of Oregon of 1921 is an act adopted in pursuance of the police

powers of the state, and that the requirement relating to the registration of motor vehicles, with an exaction of registration or license fees is an element or subject pertaining to the police powers. Now we have recent authority from the Supreme Court that such regulation, in so far as it might impinge upon the interstate commerce clause of the Constitution, if it is reasonable and not arbitrary or despotic, is entirely within the authority of the Legislature acting within the police powers of the state to enact. I refer to the cases of Hendrick v. Maryland, 35 S. Ct. 140, 235 U. S. 610, 59 L. Ed. 385, and Kane v. New Jersey, 37 S. Ct. 30, 242 U. S. 160, 61 L. Ed. 222.

The Hendrick Case covers so fully the conditions that prevail here and elsewhere, respecting highways and the nature of motor vehicle traffic, that I may be pardoned in quoting at length from the opinion, respecting the general facts as well as the law applicable:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic, the state of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the state put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registra-

tion of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens, and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.
• • •

"In view of the many decisions of this court there can be no serious doubt that, where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself, and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard they constitute no burden on interstate commerce."

The Kane Case, as it respects the power of state regulation, reaffirms the doctrine of the Hendrick Case. The court there says:

"The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety, and it is properly exercised in imposing a license fee graduated according to the horse power of the engine."

It is a dogma of legislation that the action of the state must be treated as correct unless the contrary is made to appear (Hendrick Case, page 624 [35 S. Ct. 143]), and it was further said:

"In the instant case there is no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed, and we cannot say, from a mere inspection of the statute, that its provisions are arbitrary or unreasonable."

The registration or license fees are denominated by the Supreme Court of Oregon a privilege tax. Briedwell v. Henderson, 195 P. 575, 99 Or. 506; Northwest Auto Co. v. Hurlburt, 207 P. 161, 104 Or. 398; Camas Stage Co., Inc., v. Kozer, 209 P. 95, 104 Or. 600, 25 A. L. R. 27. And Mr. Justice McBride, very cogently and lucidly, gives reasons for so calling it:

"That purpose, in a nutshell, was to require the owners of motor vehicles to make good to the state the extra damage and wear and tear caused by the use of the vehicles upon its highways. The use of motor vehicles upon the roads was comparatively an innovation, having grown to its then proportions in the space of a few years. For such use better and more permanent roads and roadbeds were required than for the comparatively light vehicles theretofore employed. Their weight and swiftness were calculated to work serious injury to the roadbeds prepared for lighter and slower vehicles, and necessitated highways more permanently constructed and more frequent repairs to those already in use." 104 Or. 407 (207 P. 164).

And he further declares:

"As a police measure, it was nothing more than fair that the agencies causing and requiring this extra expense should be required to pay for it."

And in the Henderson Case, supra (page 518 [195 P. 579]), the court further declares:

"We cannot say that the license fee exacted for the privilege of operating motor vehicles upon the highways of this state is unreasonable."

[1] If such a tax or license fee is not inimical to the interstate commerce clause of the Constitution, it is not at all clear or obvious that it contravenes the clause respecting tolls of any kind as found in the Rural Post Roads and Federal Highway Acts. Indeed, it would seem that, on the contrary, it does not. The state act, being a police regulation, must be deemed to be regular and valid, unless it appears on its face to be an unreasonable and arbitrary exercise of the police power, or is made so to appear by clear and cogent showing aliunde. Such a showing has not been attempted. I am in accord with the Supreme Court

of the state, that the state regulation, upon its face, is not an arbitrary nor despotic exercise of the police power.

Further than this, as we said in the Anthony Case, the tax lacks the characteristics of a toll. "In its general acceptation, toll is 'a settled, certain and defined sum exacted for the use of a common passage; a tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; * * * a tax paid for some use or privilege or other reasonable consideration; the consideration for the use of a road or bridge, not compensation for carriage over it; a tribute or custom paid for passage; something taken for a liberty or privilege.' 38 Cyc. 359."

And we further said:

"No doubt the Congress had in mind, in adopting the clause, 'All highways constructed or reconstructed under the provisions of this act shall be free from tolls of all kinds,' the many toll roads of the country that were in years previous constructed through grants of public lands and bounties appropriated by the general government, and on which, for the privilege of passage, the proprietors were permitted to exact tolls, and it was adopted as a policy that no tolls of any kind should be exacted for the privilege of passage over the rural post roads for the construction of which the government was to appropriate its public funds. Such is obviously the intendment of the acts of Congress in extending aid to the states for construction and maintenance of their roads, and highways. The excise tax here provided for has no relation to the tolls inhibited by the acts of Congress, and is therefore not to be condemned as such."

So we say here the registration or license fees here exacted have no relation to the tolls inhibited by the acts of Congress, and are not to be condemned as such.

[2] I am persuaded, therefore, that the registration or license fees, or privilege tax, as designated by the state Supreme Court, here imposed are not a toll of any kind within the intendment of the acts of Congress cited, and therefore that the state legislation is not void, as contended by complainants.

Motion to dismiss sustained.

o